United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7468

To be argued by
RICHARD A. HOLMAN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

H. C. WAINWRIGHT & CO.,
Plaintiff-Appellee,

against

WALL STREET TRANSCRIPT CORPORATION and RICHARD A. HOLMAN,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF DEFENDANT-APPELLANT RICHARD A. HOLMAN

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Preliminary*

The defendants appeal from a superseding order of the United States District Court for the Southern District of New York (Lasker, D.J.) dated October 12, 1976, which order, among other things, temporarily enjoined the de-

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* Figures in parentheses refer to pages in joint appendix unless otherwise noted.

fendants, a weekly newspaper and its editor pending determination of the action, from

a) publishing, selling, marketing or disposing of news accounts of plaintiff's copyrighted research reports which had been previously published in the May 10, 17, 24 and 31, and July 5, 1976 issues of The Wall Street Transcript (a weekly newspaper);

b) publishing, selling, marketing or otherwise disposing of any other news accounts of any of plaintiff's copyrighted research reports (whether or not such research reports were then in existence or were written later).

The research reports in the record are fairly voluminous, detailed reports about publicly held companies, which are distributed by plaintiff to approximately 900 of its institutional clients (131a). According to plaintiff (131a):

> "Basic Reports are always based upon interviews with one or more company officials."

Questions Presented

1. Does the "gag" order issued below prohibiting the defendant newspaper and its editor from publishing or distributing truthful news accounts of important newsworthy reports, direct from the source, violate defendants' First Amendment rights and the right of the public to know?

2. Does the "gag" order under these circumstances violate the Constitutional objectives of the copyright laws as set forth in Art. I, Sec. 8 and the First Amendment?

3. Can the copyright law be constitutionally construed and applied to enjoin or penalize a newspaper and its

editor which publishes truthful news accounts of important newsworthy reports direct from the source?

4. Can the plaintiff as the originator of important newsworthy statements use the copyright laws to prevent a truthful news report thereon from being made available to the public?

5. Where the plaintiff issues reports on publicly traded companies based on inside information obtained from the company managements as important information input and these reports are used by a limited number of major banks and institutions as fundamental input in their investment decisions on publicly traded stocks, does the public interest in free and open capital markets and full disclosure bar the plaintiff from using the copyright laws to keep the American public from getting news of these reports.

6. Did the news reporting by the defendant newspaper and its editor constitute fair use of the plaintiff's reports?

7. Where there was no evidence of harm or competition between plaintiff and defendant, was the issuance of the temporary injunction improper?

Statement of the Case

The Facts

The Plaintiff:

H. C. Wainwright is engaged in the institutional research business in the publicly traded equity markets (5a). Its institutional clients number about 900 and include most of the major banks, insurance companies, mutual funds, investment counselors, pension funds and similar institutional investors throughout the free world (31a).

Plaintiff supplies these important institutional investor clients with reports on the equities of publicly traded companies which account for the bulk of the market value of a typical institutional equity portfolio (131a). Plaintiff's Basic Research Reports "are always based upon interviews with one or more company officials" (132a). In preparing all of their reports on publicly traded companies plaintiff's analyst writing the report "meets individually with management representatives of such companies" (132a). These "sources of information . . . provide important inputs" to plaintiff's security analysts (132a). All of plaintiff's Research Reports, before final publication are circulated "to members of the management of the company or companies concerned for comments" (133a). The major banks, insurance companies and others of plaintiff's 900 institutional clients use these reports as "fundamental input" when making investment decisions on publicly traded stocks (136a).

The Defendants:

Defendant Richard A. Holman is editor and publisher of Defendant, The Wall Street Transcript, a weekly newspaper that has been published every week since 1963 (5a). Subscribers to the newspaper include colleges, universities and libraries (131a). The Transcript is available to the public in some 500 libraries throughout the United States (232a).

Since 1974, Defendant Transcript has been publishing news accounts of research reports on publicly traded corporations issued by the plaintiff and published about 100 such news accounts prior to the commencement of this action (232a). Plaintiff began copyrighting the reports in April, 1976 (241a). Transcript has also published news accounts of reports issued by over one hundred different

firms which are similar to plaintiff (191a). These reports are copywritten (191a). Plaintiff is the only issuer of reports to sue over the news accounts published in The Wall Street Transcript (191a). The news accounts of the research reports of the plaintiff amount to less than one tenth of one percent of a typical issue of the Transcript (232a).

Plaintiff placed in the record two advertisements of the Transcript which appeared in Barron's, a weekly newspaper. Transcript's ad on October 27, 1975, headlined: "You Have a *Right* to Know" (emphasis in original) what leading investment houses across the country are saying to the big institutional clients and added "if you have any interest in the stock market, or business, or the economy, you not only have a right, but an urgent need to get this timely news" (164a). In the other ad on July 5, 1976, Transcript urged Barron's readers to "get all this timely news . . . ask for it at your public library" (162a).

On June 4, 1976 Plaintiff Wainwright sent a notice to its major banks and other clients that it would use the Copyright Laws to prevent the media from publishing news reports on the research reports it has issued (286a).

The only affidavit from an independent person not involved in this litigation is from Myron Kandel who is currently President of the highly respected Society of American Business and Economic Writers and publisher of the Review of the Financial Press. He was the financial editor of the New York Herald Tribune and the editor of the New York Law Journal. In his affidavit, Mr. Kandel states:

> "I am familiar with brokers' reports, having read many of them over the years. Brokers' reports constitute important news for the business and financial community; they can have a significant

economic or financial impact. In fulfilling its obligations to provide the public with comprehensive news and information it is essential for the business and financial press to be able to report on the contents of brokers' reports on a consistent continuing basis." (237a).

This case concerns five Reports on publicly traded companies issued and distributed by plaintiff, and five news stories published by defendant newspaper and its editor, as follows:

	Plaintiff Report	Defendant News Story
FMC Corp.	April 13, 1976 (20a)	May 10, 1976 (27a)
Overnight Transportation	April 27, 1976 (32a)	May 17, 1976 (58a)
Monsanto Company	April 28, 1976 (61a)	May 24, 1976 (71a)
Eastman Kodak, Polaroid	April 30, 1976 (75a)	May 31, 1976 (80a)
C.I.T. Financial Corp.	June 15, 1976 (83a)	July 5, 1976 (126a)

The five research reports of plaintiffs involved here total over 36,000 words and figures; the five news stories of defendant total less than 1,400 words and figures.

The Opinion Below

A major defect of the opinion below is the erroneous ruling by the Court that the reports issued by important brokers, such as the plaintiff, which often have major impacts on the economy, are not important news. They are important news to the millions of investors throughout the country who are impacted, often drastically, by these reports, and to others interested in our economy.

Such reports can have nationwide economic repercussions. Every competent writer we know has concluded that reports issued by brokers can have dramatic impact. The daily newspapers and the business and financial press continually affirm this. It is simply disastrous to the economic health of this nation to decree that the majority of the country is to be barred from this news. Not only are brokers' reports among the most important news items in the business and financial world, to some they are of overriding importance. Where the broker involved is as important as Wainwright indicates it is, and where its customers, major banks, insurance companies and the like, can have such tremendous impact on the nation's economy, what the broker says is even more important.

The Wall Street Transcript is one of many newspapers which inform the public of what important brokers are saying. Since plaintiff has taken steps to freeze out the public, Transcript contends that its news reports serve the public interest in the free dissemination of information. The Court below answered this saying the Transcript was free to write its own reports (223a). How this would inform the public what an important broker like Wainwright is saying is not made clear in the opinion.

In short, the Court below holds that only big important banks and others who can afford to pay all the major brokers to get the all-important news of what they are saying are entitled to be informed—the rest of the public, including some 25,000,000 shareholders, (some, admittedly, very small) are not.

Throughout its opinion the Court below referred to defendants' new stories as "abstracts". Claiming that the defendant newspaper advertised itself as a purveyor of "reports in abstract form", the Court's opinion quoted at length from two announcements which appeared in Barron's (212a). These two announcements, one dated Oc-

tober 27, 1975, the other July 5, 1976, are the only two in the record and were put in by the plaintiff. Though not quoted in the opinion of the Court, both announcements referred to defendant's material as "timely news". (162a, 164a).

The Court found that nothing in the record supports the claim that inside information is used in preparation of or is included in the research reports (217a). This holding is incompatible with plaintiff's assertions that its experts, familiar with all the public information on the company, *base* their reports on interviews with management, (131a) always meet with representatives of management (132a), that these sources of information provide important inputs to plaintiff's security analysts, (132a), that managements check the drafts of reports (133a), and then these reports are used by major banks and others as "fundamental input" when making investment decisions (136a). Certainly, in meeting with management these skilled professionals, with all the public information at their command, were interested in something other than the color of [management's] hair." See *SEC* v. *Geon Industries,* 521 F2d 39, 46 (2d Cir. 1976).

I.

Public policy expressed in the First Amendment and the nation's economic laws bar the injunction.

This is a case of first impression.

This is the first case we know where a Court has held that the truthful reporting of current newsworthy material of public interest direct from the source can be barred or penalized under the copyright laws.

The Supreme Court has thrown out all attempts to bar such news reports in the press even where national se-

curity, reputation, the constitutional right to an impartial jury, administration of justice and privacy claims were advanced. Certainly most of these are more important in our Society than the limited rights of Copyright, permitted but not mandated by the Constitution.

This case should be considered in the framework of the strong public policy in favor of the full, unimpeded flow of truthful news on all matters of public interest and the First Amendment guarantees of freedom of the press and of speech. As stated by Mr. Chief Justice Burger in the recent "gag order" case *Nebraska Press Association* v. *Stuart*, 427 U.S. ——, 96 S. Ct. 2791 (1976) at 2801-2803:

> "The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech. None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case. . . .
>
> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time. (Footnote omitted)
>
> The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment."

This case should also be considered in the framework of the strong public policy in favor of preserving and strengthening our free enterprise system and, our capital markets, and the public interest that private economic decisions, in the aggregate, be intelligent and well informed.

In February, 1974 The Treasury Department issued a paper entitled *"Public Policy for American Capital Markets"* over the signature of George P. Schultz, then Secretary of the Treasury. The paper was prepared by James H. Lorie, Professor of Business Administration at the University of Chicago and states, in part:

> "I. INTRODUCTION
>
> American capital markets are of great importance to the vitality of the American economy. Efficient and equitable markets encourage the flow of individual and institutional savings to American corporations, thereby reducing their cost of capital and providing profitable opportunities for investors. Some informed observers feel that the relative vitality of the American economy throughout its history has been fostered to an important degree by our system of capital markets.
>
> . . .

The characteristics of the American capital markets which have produced these results are numerous, but among the more important are the fact that investors feel that they can buy at the lowest available price and sell at the highest available and the fact that the generation and flow of relevant information is relatively rapid, accurate, and complete.

Recently, according to many observers, including prominent members of both houses of Congress, American capital markets have been in disarray. Evidence of this disarray consists of reduced public confidence in American markets, as indicated by the first decline in many years in the number of Americans investing directly in common stocks,[1] the failure of many brokerage firms, and the fragmentation of markets. The loss of public confidence in our securities markets can be directly attributed to the relatively low returns on equity investments in recent years and to the feeling that institutions have an advantage over individual investors." (Page 1).

. . .

"II. Objectives of Public Policy

The general objective of public policy is to have markets that operate fairly and efficiently. Fairness and efficiency lead to confidence on the part of the investing public that returns will be reasonably related to risks, that the institutions through which they deal have financial integrity, and that the individual investor is not at a serious disadvantage compared with the institutional investor." (Page 3).

. . .

"Public policy must strive to create conditions which result in the equitable treatment of individ-

ual investors as compared with institutional investors." (Page 5).

. . .

"IV. Summary and Conclusions

. . . The overriding objective of public policy is to make our capital markets function more equitably and efficiently so as to reduce the cost of capital for American enterprise and increase the likelihood that capital will be channeled into its most productive uses. This objective can be fostered by insuring that our securities markets operate to achieve maximum efficiency in determining prices of securities and in effecting the transfer of ownership of securities. Moreover, attainment of this public policy objective requires the achievement of equity in relationships between investors and their financial agents, as well as between individual investors and institutional investors." (Page 19).

As pointed out in Levine, Financial Analysts Handbook, Vol 2 (1975) in a comment written by William E. Chatlos on the Treasury Department Report, at page 74:

> "Put another way, the average investor simply feels that he cannot compete equitably in the marketplace if he does not have access to the same lexicon of information that his more formidable counterparts do."

In a study entitled "Share-Ownership 1975" the New York Stock Exchange points out that in 1975 there were 25.27 million shareowners compared with 30.85 million in 1970 (p. 1), that over a million shareowners are located

in each of the top three metropolitan areas, Chicago, Los-Angeles-Long Beach and New York, listed in order of number of shareowners (p. 9), that individual investors own 52.7% of the estimated market value of shares for all publicly held companies and individual shareowners account for 92.5% of the estimated number of stockholders of record (p. 20).

The Public Transaction Study: 1976 of the New York Stock Exchange shows that in 1976 the comparison of Public volume on the NYSE between public individuals vs. institutions and intermediaries, public individuals accounted for 42.7% of the shares and 29.7% of the value of the NYSE 1976 volume.

Clearly, the news and information needs of a large segment of the American public are denied by the order below. On the other hand, the reporting of this news by The Wall Street Transcript and other members of the nation's free press contributes substantially to strengthening public confidence in our economic system.

II.

The "gag" order issued below prohibiting the defendant newspaper and its editor from publishing or distributing truthful news accounts of plaintiff's important newsworthy reports violated defendants' First Amendment rights and the right of the public to know.

In an unbroken line of cases the Supreme Court of the United States has struck down every injunction or penalty, under a statute or otherwise, levied against the publication in the press of a truthful news report direct from the source. Indeed, even possible falsehood or defamatory matter has been held insufficient to justify a prior restraint on the press.

Of course, the landmark case on the invalidity of prior restraints is *Near* v. *Minnesota,* 283 U.S. 697 (1931) where a state statute banning the publishing of malicious, scandalous and defamatory matter was struck down as a violation of the First Amendment.

In *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967) the Court considered the application of Sections 50 and 51 of the New York Civil Rights Law, the so-called "Right of Privacy" law and set aside a verdict under the statute even though the report involved was deemed to be erroneous. Knowing and reckless falsity was held to be the minimum standard for liability under the statute in reporting newsworthy items.

In that case, though, the opinion shows that on the reargument preceding the holding, counsel had been asked to brief and argue the question:

> "Is the truthful presentation of a newsworthy item ever actionable under the New York Statute as construed or on its face?"

The Supreme Court in *Time* made it clear that serious constitutional questions were avoided because an intervening New York Court of Appeals opinion made it crystal clear that:

> ". . . truth is a complete defense in actions under the statute based upon reports of newsworthy people or events." 385 U.S. at 383.

And the absolute constitutional defense is not limited to truth but extends even to negligent falsity or worse. Said the Court:

> "We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of mat-

ters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill* v. *Alabama,* 310 U. S. 88, 102." (385 U.S. at 387, 388)

In *New York Times Company* v. *United States,* 403 U.S. 713 (1971) news reporting was involved, and the Government which sought to enjoin publication by the Times (and temporarily succeeded) was held to carry " 'a heavy burden showing justification of such a restraint.' *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419", 403 U.S. at 714. Mr. Justice Black (Mr. Justice Douglas, concurring) objected to any holding that "the publication of news may sometimes be enjoined . . ." or "that the Government can halt the publication of current news of vital importance to the people of this country . . ." 403 U.S. at 715. Said Mr. Justice Black:

> "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions or prior restraints." 403 U.S. at 717.

Mr. Justice Brennan noted:

> "So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession." 403 U.S. at 725.

and, Mr. Chief Justice Burger, writing in dissent, pointed out:

> "So clear are the constitutional limitations on prior restraints, that from the time of Near v. Minnesota ex. rel. Olson, 283 U.S. 697 (1931), until recently in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest." 403 U.S. at 748.

In the *New York Times* case, the claimed jeopardy to national security was insufficient to overcome the right to truthful news reporting.

In *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) it was held that a state statute could not impose liability, consistently with the First and Fourteenth Amendments where a television reporter truthfully broadcast from court records, the name of a rape victim in a news report.

In *Nebraska Press Association* v. *Stuart,* 427 U.S. , 96 S.Ct. 2791 (1976) the Supreme Court held that a State Court "gag order" violated the First Amendment prohibi-

tions against prior restraint even though the Sixth Amendment Right to trial by an impartial jury had been urged as the basis for the order. As Mr. Justice Brennan pointed out in a concurring opinion (Mr. Justice Stewart, Mr. Justice Marshall, concurring):

> "The right to a fair trial by a jury of one's peers is one of the most precious and sacred safeguards enshrined in the Bill of Rights." (96 S.Ct. at).

But this was insufficient as the basis for a "gag" order. The reason for this, in the opinion of the Court:

> "The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." 96 S.Ct. at 2803.

Plaintiff's reports are news, of wide public interest, and capable of having important econo repercussions.

Brokers' reports are among the most important news items in the economic marketplace, and plaintiff claims to be an important broker. In Klein and Prestbo, News and the Market (1974), the authors, two reporters for the Wall Street Journal point out in their chapter entitled "The News: Where to Find It" at p. 28:

> "Wall Streeters agree that brokerage house reports provide the dominant rationale for the stock trading decisions of both institutional and individual investors. One needn't be on every broker's mailing list to become aware of key reports; they are increasingly finding their way into the news columns of the broader press, and more and more analysts—in addition to doing their regular chores—are becoming columnists for business publications.

> The combination of a strongly worded analyst's report and its coverage in a large-circulation newspaper or magazine can shake stocks more than either could alone. An example of this came in November 1972, when reports became widespread that Oppenheimer & Co., a New York-based firm with a large institutional following, was preparing to release a study casting doubt on the long-term prospects of the then fast-growing hospital management field. In little over a week's time, the stocks of two major companies in the business dropped by around 20% on *rumors* of the study. The day its existence was confirmed in the *Wall Street Journal's* widely read "Heard on the Street" column, they dived again. One of the issues took a single-day drubbing of 13%."

* * *

In Rolo and Nelson, The Anatomy of Wall Street (1968) in the chapter entitled "Wall Street Knowledge Industry" written by Louis Stone, we find further comment on the possible repercussions of reports by brokers, at Page 24:

> "In fact, it is quite impossible for any analyst or any investor to keep up with the flood of research studies that are available, free-for-nothing, to clients and prospective clients. Most of this material is now conveniently assembled in a 40- to 50-page, well-indexed publication, the *Wall Street Transcript* . . . Many people poke fun at Wall Street's so-called guessing game and consider the whole business of research reports and market letters just a "come-on" aimed at the sucker public. Nothing could be further from the truth in the present-day environment. Readers capable of winnowing out the grain from the chaff can get from the *Wall Street Transcript* a valuable insight into industry developments

> and into the record of and prospects for particular stocks. The old days when Wall Street research was largely consigned to low-paid statistical hacks are long since gone. The opinions of today's leading industry specialists are not just market comment; they often are the stuff that *makes* markets. A well-researched buy or sell recommendation from one of the big brokerage houses, or from a firm noted for its industrial research, may well influence the price of a particular stock for months to come. In addition to brokerage house research reports, the *Transcript* also publishes the full text of speeches made by corporate officials to meetings of security analysts. These texts often contain new and authoritative information about company developments and prospects." (Emphasis in original).

See also, Zarb and Kerekes, The Stock Market Handbook (1970), Chapter 15 entitled "Business News Sources and Services" at page 213.

As Myron Kandel, the current President of the important Society of American Business and Economic Writers and former financial editor of the New York Herald Tribune noted in his affidavit herein:

> "I am familiar with brokers' reports, having read many of them over the years. Brokers' reports constitute important news for the business and financial community; they can have a significant economic or financial impact. In fulfilling its obligations to provide the public with comprehensive news and information it is essential for the business and financial press to be able to report on the contents of brokers' reports on a consistent continuing basis." (237a).

Brokers' reports are such important news in the world of business and finance that the proposed new Federal Securities Code cites as an example of [illegible] the following: Trading in a stock by the president of a company after he has received information from a large brokerage firm's analyst who has interviewed him to the effect that the firm is about to publish a favorable report on the company together with a "buy" recommendation. According to the proposed code that fact is generally available when it is disclosed in a filing or otherwise brought to the attention of the investing public. See American Law Institute, Federal Securities Code, Reporters Revision of Text of Tentative Drafts Nos. 1-3, October 1, 1974 Sec. 1301-1303, pages 93 et seq.

If one broker can copyright reports and limit news of these reports to a few large institutional clients, then all brokers can do the same. To deny the public access to this important news and limit this to the few large institutions able to afford to get news of these reports direct from the brokers would further undermine any confidence for members of the public that they can compete with major institutional investors.

Society has a strong interest in intelligent voting. As Mr. Justice White pointed out in *Cox Broadcasting,* 420 U.S. at 469:

> "In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are

> the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."

Society has an equally strong interest in matters of economic decisions, especially where economic repercussions can be involved. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. , 96 S.Ct. 1817 (1976) the Court noted: 96 S.Ct. at 1826-1827:

> "The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. See, *e. g., NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617-618, 89 S.Ct. 1918, 1941-1942, 23 L.Ed.2d 547, 580-581 (1969); *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477, 62 S.Ct. 344, 348, 86 L.Ed. 348, 354 (1941); *AFL* v. *Swing*, 312 U.S. 321, 325-326, 61 S.Ct. 568, 569-570, 85 L.Ed. 855, 857 (1941); *Thornhill* v. *Alabama*, 310 U.S. at 102, 60 S.Ct., at 744, 84 L.Ed., at 1102. We know of no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general or to any subject beyond their immediate dispute. (Footnote omitted). It was observed in *Thornhill* that "the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing." *Id.*, at 103, 60 S.Ct., at 744, 84 L.Ed., at 1103. Since the fate of

such a "single factory" could as well turn on its ability to advertise its product as on the resolution of its labor difficulties, we see no satisfactory distinction between the two kinds of speech.

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . ."

"So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. See *Dun & Bradstreet, Inc.* v. *Grove,* 404 U.S. 898, 904-906, 92 S.Ct. 204, 208-209, 30 L.Ed.2d 175, 177-178 (1971) (Douglas, J., dissenting from denial of certiorari). See also *FTC* v. *Proctor & Gamble Co.,* 386 U.S. 568, 603-604, 87 S.Ct. 1224, 1242-1243, 18 L.Ed.2d 303, 324-325 (1967) (Harlan, J., concurring). And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy (footnote omitted), we could not say that the free flow of information does not serve that goal." (footnote omitted).

How one perceives the impact of government policy on his investments may be a strong factor in the decisions to vote one way or another, support one candidate or an-

other, endorse one policy or another. Reports by brokers are replete with discussions of how government actions or policies may impact the economy, an industry or a particular company. They can be important in how a voter perceives the impact of these factors on his economic interest, which in turn, may strongly influence how he votes or reacts to political affairs. Certainly, this reality underlies the reason why many men in influential positions in Government divest themselves of their security holdings or put them in blind trusts.

Consistent with this, news accounts of reports constitute much of the reporting of news of the government. As the Court pointed out in *Time Incorporated* v. *Pape,* 401 U.S. 279 (1971) at 285:

> "But a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like. The question of the "truth" of such an indirect newspaper report presents rather complicated problems.
>
> A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact—such as that a policeman has arrested a certain man on a criminal charge—there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify. Any departure from full direct quotation of the words of the source, with all its qualifying language,

inevitably confronts the publisher with a set of choices." (Emphasis in original).*

The Court below said: "The Transcript's ingenious designation of the reports as news is faulty" (216a). This holding is clearly wrong.

Plaintiff has chosen to write on publicly traded equities, in the publicly traded market. This market belongs to all the citizens of the nation. The press must be free to report the news, all news to them. They are entitled to know from their press what may be affecting their economical well-being or the market or the stock which may represent their life savings.

There are numerous examples of the special impact of the First Amendment on those who choose to go into public office or positions of importance in public life where what they say and do becomes newsworthy. Statutes that may give rights to one in totally private life do not apply for one who, by choice, has entered into activities which have an important public interest.

In *New York Times* v. *Sullivan,* 376 U.S. 254 (1964) the Court severely limited the right of a public official to recover damages for newspaper comments on his official conduct. The public official must prove actual malice. In *Curtis Publishing Co.* v. *Butts and Associated Press* v. *Walker,* 388 U.S. 130 (1967) it became clear that there is a limitation of the right to recover for damage to reputation for public figures who are involved in issues in which the public has a justified and important interest.

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* Just as brokers' reports do, Government reports containing studies, analyses, predictions, forecasts or recommendations often have dramatic economic impact with widespread repercussions.

Even where individuals are thrust into the limelight, involuntarily, their right to recover for damage to reputation or privacy can be curtailed to afford full application of the rationale underlying the First Amendment. *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967) and *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) are further examples of limitations on statutory rights where the First Amendment and matters of public interest are involved.

The copyright law is a statute. It is not a matter of Constitutional mandate. The First Amendment is.

It would destroy the First Amendment if a person who by virtue of his occupation or office is in a position to make newsworthy statements, could copyright them and then prevent news reports thereon. One cannot be a news creator and bar the public from knowledge of it. In Kaplan and Brown, Cases on Copyright (2 Ed. by Brown 1974) the question is posed at page 348:

> "Does the Rosemont case require invocation of fair use at all? Suppose that, contrary to the facts, Admiral Rickover . . . had tried to enforce his copyright against newspapers who reported his speeches verbatim. Could they claim fair use?"

The answer is contained in the well known book by one of the casebook authors, Kaplan, An Unhurried View of Copyright (1967) where then Professor, now Justice Kaplan wrote (p. 61):

> "Some public utterances should themselves qualify as facts so that newspapers should be allowed to publish them in full text, regardless of the authors' wishing otherwise or taking out formal copyrights."

If plaintiff can use the copyright laws to thwart the First Amendment rights of the press to report and the public to know, then so can others. A president-elect

could describe his plans for the first 90 days in office—for sale at $10,000 per copy to swell the party coffers and then use the copyright laws to prevent newspaper reporting. A foreign leader could come here, make important newsworthy statements, copyright the same and prevent news reporting. Congress could pass a copyright law for government papers and have the label "copyright" destroy news reporting.

In *Rosemont Enterprises, Inc.* v. *Random House Inc.*, 366 F 2d 303 (2 Cir. 1966), Howard Hughes, who had become quite a public figure, sought to use the copyright laws to suppress a biography of him. While the holding of the Court is grounded in fair use, a concurring opinion of Chief Judge Lumbard (Concurred in by Hays, J. thus constituting a majority of the bench) pointed out (p. 311):

> "The spirit of the First Amendment applied to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature."

Commenting on the decision of the Court below, the Review of the Financial Press, Vol. IV, No. 17, September 9, 1976 states (page 1):

> "A recent decision by a Federal Judge in New York has *alarming implications for the coverage of financial news* by the nation's press." (emphasis in original).

The decision below also has alarming implications for public confidence in our economic system.

III.

The application of the copyright laws to the facts in this case violates the Constitutional limitations on copyright and the First Amendment.

All valid rights, including property rights created by statute are authorized by the Constitution. For the property right of patent 35 U.S.C. 1 *et seq.*, and copyright, 17 U.S.C. 1, *et seq.* there is a specific power accorded to Congress by the Constitution. That power specifies the limited objective for which the patent and copyright statutes are authorized.

The Constitution provides that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art 1, Sec. 8, cl. 8.

The primary purpose of these statutes is to promote the public welfare; reward to the author or inventor is a secondary consideration. *Mazer* v. *Stein,* 347 U.S. 201 (1954); *United States* v. *Paramount Pictures,* 334 U.S. 131, 158 (1948).

The opinion of Mr. Justice Douglas, dissenting from a denial of certiorari in *Lee* v. *Runge,* 404 U.S. 87 (1971) is illuminating on this point (404 U.S. at 88):

> "While this Court has not had many occasions to consider the constitutional parameters of copyright power, we have indicated that the introductory clause, 'To promote the Progress of Science and useful Arts," acts as a limit on Congress' power to grant monopolies through patents. In *Graham* v. *John Deere Co.,* 383 U. S. 1, 5-6, we said:

'The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the 'useful arts.' It was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of the useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored. And it is in this light that patent validity 'requires reference to a standard written into the Constitution.' (Citations omitted.)

In *Mazer* v. *Stein,* 347 U. S. 201, 219, we indicated that the copyright power is also governed by this same introductory phrase: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the

> talents of authors and inventors in 'Science and useful Arts.'" See also *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 249. In other contexts, we have also shown that patents and copyrights stand on the same footing. *E. g., United States* v. *Paramount Pictures,* 334 U.S. 131, 158; *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 401."

The holding of the Court below utterly fails to come to grips with the heavy burden of showing justification for the "gag order" here, *New York Times Company* v. *United States,* 403 U.S. 713 (1971). The holding also fails to show how it serves the limited Constitutional objectives set forth in the authority for the copyright laws.

As applied herein, the copyright laws violate the Constitution, Article I, Sec. 8 and the First Amendment.

IV.

Defendant made fair use of the material of plaintiff.

Fair use stems from a limitation of the statutory rights of copyright derived from the Constitutional objectives set forth in Article I sec. 8. The First Amendment compels an implied limitation on statutes that otherwise might be in conflict with its mandates. Under either constitutional provision, defendant's use herein was fair use. *Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 366 F. 2d 303 (2 Cir. 1966); *Time, Inc.* v. *Bernard Geis Associates* 293 F. Supp. 130 (S.D.N.Y. 1968).

The Wall Street Transcript serves the public interest in making available to the public news and information they might not otherwise have. Certainly, if plaintiff

has its way the public will not know, now or later, what important and newsworthy statements come from this important broker.

V.

Plaintiff should be denied any relief because it used inside information.

The facts out of plaintiff's own mouth show that its reports were "based" on inside information. The undisputed record shows as follows:

> Plaintiff's Basic Research Reports "are always based upon interviews with one or more company officials" (132a). In preparing all of their reports on publicly traded companies plaintiff's analyst writing the report "meets individually with management representatives of such companies" (132a). These "sources of information . . . provide important inputs" to plaintiff's security analysts (132a). All of plaintiff's Research Reports, before final publication are circulated "to members of the management of the company or companies concerned for comments" (133a). The major banks, insurance companies and others of plaintiff's 900 institutional clients use these reports as "fundamental input" when making investment decisions on publicly traded stocks (136a).

And all of this occurs after plaintiff's industry experts have familiarized themselves with all of the public information on the company (132a). The case comes squarely within the securities violations found in *SEC* v. *Geon Industries,* 521 F. 2d 39 (2 Cir. 1976) where the Court had found that the company president, Neuwirth, had

disclosed non-public information to Rauch, a broker. The Court noted 521 F. 2d at 46:

> "The SEC was unable to provide direct evidence of disclosures by Neuwirth to Rauch; Rauch asserted the privilege against self-incrimination and Neuwirth claimed inability to recall the subject-matter of most of their numerous talks. However, inability to reproduce the precise content of conversations under these circumstances cannot be an absolute bar to liability; the circumstantial evidence sufficed to justify the court's inference that Rauch was getting from Neuwirth something that was not available to the public.
>
> Neuwirth did testify he knew that Rauch was actively engaged in selling the company's shares; that Rauch pursued him assiduously, and indeed was the only broker who was calling him; and that he did not tell Rauch to stop the calls until sometime in January, 1974. In addition, he lunched with Rauch alone, something he did with no other broker, accepted two bottles of liquor Rauch sent him following this lunch, and honored one of Rauch's telephone messages by a return call from home. This testimony goes a long way toward supporting the finding that Neuwirth was disclosing nonpublic information; certainly Rauch was interested in something other than the color of Neuwirth's hair or in getting information available to everyone."

Thus, not only does plaintiff seek to bar the public from important news affecting the public's marketplace, it seeks to preserve for itself and its major institutional clients the benefits of its inside information. The language of Chief Judge Lumbard in *Rosemont,* 366 F. 2d at 311 is apposite:

"The district court should have denied any preliminary injunction to this plaintiff as there was good reason to believe that it was the instrument of Howard Hughes, created principally for the purpose of suppressing the biography of Hughes which Random House had published. We cannot approve an injunction under such circumstances as the plaintiff does not come here with clean hands. It has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity."

VI.

The Court below abused its discretion in granting the injunction.

Whether the label is "libel", "secret", "copyright" or any other label, the First Amendment must be satisfied. As the Supreme Court pointed out in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) at p. 269:

> "In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. *N. A. A. C. P.* v. *Button,* 371 U.S. 415, 429. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (Footnotes omitted).

So too, the copyright law has no "talismanic immunity" from constitutional limitations, or the First Amendment.

One cannot use the copyright laws to censor news reporting.

The "gag order" of the Court below violates the First Amendment. It is a gross misapplication of the copyright laws. It violates Article I, Section 8 of the Constitution, under which the copyright laws were enacted. The "gag order" is contrary to any public interest or public policy, and will inevitably undermine the confidence of the public in our economic system. The plaintiff has not shown it has suffered any harm or damage. The plaintiff has used inside information to benefit itself and a few major institutional investors in violation of public policy, disclosure laws and principles of equity. Nothing in the decision below overcomes the presumptive unconstitutionality of the order. The Court below abused its discretion in granting the injunction.

CONCLUSION

The order appealed from should be reversed with costs.

Respectfully submitted,

RICHARD A. HOLMAN, *Pro Se*
Defendant-Appellant

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WAINAWRIGHT

VS

WALL STREET TRANSCRIPT

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

BERNARD S. GREENBERG being duly sworn,

deposes and says that he is over the age of 21 years and resides at 162 E. 7th street, NY, NY

That on the 15th day of FEB, 1977 at

he served the annexed brief of appellant Holman, upon

1. Cahill Gordon & Reindel, 80 Pine street, NY, NY

2. Eaton Van Winkle & Greenspoon, 600 third avenue, NY, NY

in this action, by delivering to and leaving with said attorneys

two true cop thereof.

DEPONENT FUETHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 15th day of feb, 1977

Roland W. Johnson

Bernard S Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977